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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ____

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

GERALD JOSEPH LAVOIE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on April 8, 1966.

OPINIONS BELOW

The majority and concurring opinions in the court of appeals (Appendix, *infra*, pp. 8–9; R. 210) are reported at 360 F. 2d 27.

JURISDICTION

The judgment of the court of appeals (Appendix, *infra*, p. 9; R. 211) was entered on April 8, 1966. On July 5, 1966, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to

and including September 5, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 212(a)(4) of the Immigration and Nationality Act of 1952, which excludes from admission into the United States aliens "afflicted with psychopathic personality," is void for vagueness as applied to homosexuals.

STATUTE INVOLVED

Section 212(a)(4) of the Immigration and Nationality Act, 66 Stat. 182, 8 U.S.C. 1182(a)(4), provides in pertinent part:

> Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens * * * shall be excluded from admission into the United States:
>
> * * * * * *
>
> (4) Aliens afflicted with psychopathic personality * * *.

Section 241(a)(1) of the Act, 66 Stat. 204, 8 U.S.C. 1251(a)(1), provides in pertinent part:

> Sec. 241. (a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry * * *.

STATEMENT

Respondent is a forty-two-year-old single alien, a native and citizen of Canada, who entered the United States for permanent residence on January 26, 1960

(R. 187–188).[1] About sixteen months after his initial entry, respondent was arrested in San Francisco in connection with a homosexual incident (R. 193), and pleaded guilty to violation of a local statute prohibiting lewd and indecent acts (R. 60). This incident resulted in an investigation by the Immigration Service. The Service issued an order to respondent to show cause, which alleged that he had been a sexual deviate at the time of his entries on January 26, 1960, and May 5, 1960; that consequently he had been excludable, under Section 212(a)(4) of the Immigration and Nationality Act, as an alien afflicted with psychopathic personality; and that he was therefore subject to deportation under Section 241(a)(1) of the Act (R. 164, 185).

At hearings before a Special Inquiry Officer, a statement made by respondent on August 31, 1961, and expert psychiatric evidence were introduced. Respondent's statement (R. 187–194) indicated that he had had his first homosexual experience in late 1946; that between then and 1948 he had had no more than a dozen such experiences; that their frequency increased to once or twice a month between 1949 and 1959; but that he had had only five or six homosexual experiences in the two-year period preceding the investigation.[2] Respondent's homosexual relations were mostly

[1] Respondent went back to Canada in March 1960 and reentered the United States on May 5, 1960 as a returning resident (R. 104, 185, 188). The same statutory standards are applicable to both entries.

[2] The psychiatrist testifying for respondent offered his opinion that the number of respondent's actual homosexual experiences had been only about twelve over the sixteen-year period since his initial experience, explaining that respondent's concept of a

passive. Respondent stated that he was a "homosexual," which he defined as "a person whose sexual urges are directed to members of their own sex" (R. 189). He also stated, however, that he had had sexual relations with women on about twenty-four occasions prior to 1945 and seven or eight thereafter (R. 190).

In October 1961, a staff psychiatrist for the United States Public Health Service had interviewed respondent for approximately one hour and certified that respondent had been a sexual deviate since 1946 and that the condition had continued at least to the time of his arrest in San Francisco in 1961 (R. 196). The basis of this classification was explained as follows (R. 197–198):

> Patient is, in my opinion, a sexual deviate. Patient categorically states that he is homosexual. In this he is not completely correct in that from a psychiatric point of view he is more accurately characterized as a sexual deviate manifested by auto-eroticism and homo-eroticism. Patient's major mode of sexual gratification since puberty and continuing up to the present time has been masturbation. He admits to recurring homosexual relationships since 1946 and to men becoming the center of his sexual fantasies approximately a year before. Diagnostically this places him in the group of sociopathic personality disturbance according to the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association.

"homosexual experience" included "any kind of even thought or a glance or look at another man where he thought that something might develop" (R. 180).

On cross-examination at the hearing (R. 112–144), the Public Health Service psychiatrist repeated in some detail his earlier conclusion and reasons, specifically stating that he considered respondent a sexual deviate whose deviation manifested itself in homosexual behavior (R. 120, 127, 139–140).[3]

Respondent called in his behalf a specialist in psychiatry (R. 154–183) who testified that respondent was not afflicted with psychopathic personality or a character disorder, but was suffering from a neurotic conflict over sex, of which his homosexual behavior was symptomatic (R. 157–164, 168–169, 172, 181). He stated that respondent was not a homosexual from the psychiatric point of view (R. 161, 164–167, 177–178, 181), although his sexual behavior was abnormal and a deviation from accepted standards (R. 165–167, 171–172).

The Special Inquiry Officer found that "a person who engages in [homosexual] acts twelve to twenty-four times a year over a period of at least eleven years is a sexual deviate irrespective of the mental condition which caused them and within the definition Congress intended to apply to the term 'psychopathic personality' " (R. 100). Finding respondent a sexual deviate at the time of his entry to the United States, the Special Inquiry Officer ordered him deported.

On appeal, the Board of Immigration Appeals remanded the case for the purpose of supplementing

[3] The government psychiatrist declined to classify respondent as a homosexual in the "technical" sense (R. 117, 146–148) on the basis that his "relative history" demonstrated that masturbation rather than sexual relations with men was his "major mode" of sexual gratification (R. 146–148).

the record by inclusion of the pertinent section of the United States Public Health Service Manual and for characterization of respondent's disorder in the light thereof (R. 63, 68). At the subsequent hearing, the government psychiatrist testified that his first procedure had been to diagnose respondent medically as suffering from sexual deviation (one of the so-called "personality" disorders, in the nomenclature of the American Psychiatric Association), and then to refer to the Public Health Service Manual to determine the legal classification to be assigned (R. 29–32). The Manual places applicants who are diagnosed as sexual deviates in the statutory category "psychopathic personality" (R. 24–25).

The Special Inquiry Officer again ordered respondent deported, reasoning that "respondent having engaged in homosexual acts over an extended period of time, is a homosexual. As such, he is a sexual deviate and deportable as a member of the class of aliens afflicted with psychopathic personality at the time of entry" (R. 16, 19). On May 28, 1965, the Board of Immigration Appeals ordered the appeal dismissed (R. 2–6).

On April 8, 1966, the court of appeals set aside the deportation order on the ground that the statutory term "psychopathic personality," as applied to homosexuals, was void for vagueness. It relied on its prior decision in *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (C.A. 9), remanded on other grounds, 374 U.S. 449 (R. 210).

REASONS FOR GRANTING THE WRIT

The court below held that the term "afflicted with psychopathic personality" in Section 212(a)(4) of the

Immigration and Nationality Act of 1952 is, as applied to homosexuals, void for vagueness. This holding is in direct conflict with that of the Court of Appeals for the Second Circuit in *Boutilier* v. *Immigration and Naturalization Service*, petition for a writ of certiorari pending, No. 440, this Term. That the conflict involves an important question of federal law which should be settled by this Court is demonstrated by the grant of certiorari on the identical issue in 1962. *Fleuti* v. *Rosenberg*, 302 F. 2d 652 (C.A. 9), remanded on other grounds, 374 U.S. 449. The passage of time has not diminished the importance of the question.[4]

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted and the case heard together with No. 440.

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SEPTEMBER 1966.

[4] On October 3, 1965, Congress amended Section 212(a)(4) to provide expressly that sexual deviates are excludable. Section 15(b) of the Act of October 3, 1965, 79 Stat. 919. This amendment does not detract substantially from the importance of the issue in this case. The former language remains applicable to all aliens admitted to the United States between 1952 and 1965.

APPENDIX

United States Court of Appeals for the Ninth Circuit

No. 20220

GERALD JOSEPH LAVOIE, PETITIONER

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[April 8, 1966]

On Petition To Review an Order of the United States Immigration and Naturalization Service

Before MADDEN, Judge of the Court of Claims, and MERRILL and BROWNING, Circuit Judges

Per Curiam:

Petitioner seeks review of an order of the Immigration and Naturalization Service directing his deportation to Canada, grounded upon a finding that he was, at the time of his entry to this country, a homosexual and as such an alien "afflicted with psychopathic personality" and thus was of a class excludible by law at that time. §§ 241(a) and 212(a)(4), Im-

migration and Nationality Act, 8 U.S.C. §§ 1251(a) and 1182(a)(4).

This case is controlled by *Fleuti* v. *Rosenberg*, 302 F. 2d 652, 658 (9th Cir. 1962), *remanded on other grounds* 374 U.S. 449 (1963), where we held that the term "psychopathic personality" "* * * fails to meet the test to be applied in determining whether a statute is vague in the constitutional sense" and that the statute in its application to homosexuals is therefore void for vagueness.

The order of March 11, 1965, for deportation of Gerald Joseph Lavoie is declared to be void; that order is hereby set aside and its enforcement is enjoined.

MADDEN, *Judge*, concurring: I concur in the court's disposition of the case, but I do so only because of the precedent cited in the court's opinion.

United States Court of Appeals for the Ninth Circuit

No. 20220

GERALD JOSEPH LAVOIE, PETITIONER

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Judgment

Upon Petition to Review an order of the Immigration and Naturalization Service.

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is set aside and its enforcement is enjoined.

Filed and entered, April 8, 1966.